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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	RM-9210

REPLY COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC"), respectfully submits the following reply comments in the above-captioned proceedings. The Commission provided an opportunity to submit supplemental comments and reply comments in the above-captioned proceedings in its October 5, 1998 Public Notice.[3]

I. Initial Comments Confirm That There Is Insufficient Local Service Competition to Warrant Pricing Flexibility

In its initial comments, KMC contended that it is premature to consider establishing pricing flexibility for incumbent LECs.[4] Information submitted in initial comments confirms

[3] *Commission Asks Parties to Update and Refresh Record For Access Charge Reform and Seeks Comment on Proposals For Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256, released October 5, 1998.

[4] As pointed out by KMC in its earlier comments , collectively, CLECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategis Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data

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that is far too early to establish pricing flexibility. The record shows that incumbent local exchange carriers ("LECs") received approximately 97.5% of total local service revenues in 1997.[5] One commenter estimates that by the end of 1998, competitors will serve only 1.4 million (0.8%) of the nation's estimated 177 million access lines through UNE based entry.[6] Ad Hoc points out that SBC has stated that in its territory slightly more than 1% of total lines in its territory were facilities-based CLEC lines.[7]

Incumbent LECs are unable to muster hard factual data showing that they face substantial competition. For the most part, they rely on generalized unsupported allegations such as that competition is developing rapidly[8] or that recent industry mergers between interexchange carriers and CLECs hold the potential for increasing competition.[9] To the extent incumbent LECs provide data, it does not show that they face significant competition. Bell Atlantic states, for example, that it now has 800,000 competitive lines in its service areas and that the number of UNE loops has doubled since the *Access Reform Order*.[10] Similarly, Ameritech states that total

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nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997). KMC Comments at 2.

[5] "Telecommunications Industry Revenues: 1997," Industry Analysis Division, Common Carrier Bureau, October 1998, Table 4. Comments of Sprint at 10; GSA Comments at 9.

[6] Competition Policy Institute at 8.

[7] Ad Hoc Telecommunications Users Committee at 5.

[8] Bell Atlantic at 8.

[9] Ameritech at 4.

[10] Bell Atlantic at 10.

competitive lines in its region rose from 557,810 to 1,026,202 in the first eight months of this year. However, these statistics do no more than confirm that, in fact, CLECs provide service to only a very small percentage of the market. The growth rates seem impressive, but the absolute number of competitive lines is still only a tiny percentage of total lines in these carriers' markets.[11]

KMC submits that the amount of competition shown on this record is insufficient to warrant consideration of establishing pricing flexibility. Instead, the Commission should focus its efforts on establishing a more vigorous implementation of the interconnection, unbundling, and resale obligations of Section 251(c) of the Act.

II. Pricing Flexibility Should be Premised on Vigorous, Widespread, Actual Competition, Not Potential Competition

In the *Access Reform NPRM*,[12] the Commission proposed that the initial stage of pricing flexibility would be premised on incumbent LECs having complied with various proposed market-opening requirements that would permit the development of competition. KMC opposes granting any pricing flexibility on this basis. Pricing flexibility is, or should be, premised on the concept that pricing regulation can be removed where competition is available to discipline prices. However, until significant competition is occurring there will be insufficient marketplace forces to substitute for regulation in controlling incumbent LEC prices. In addition,

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[11] Bell Atlantic's 800,000 competitive lines is only about 2% of its total approximately 40 million lines in its service area. *See* also n. 7, *supra*.

[12] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, Notice of Proposed Rulemaking, CC Docket Nos 96-262, 94-1, 91-213, and 95-72, 11 FCC Rcd 21354, para. 163 (1996)("*Access Reform NPRM*").

the Commission's initial conception of establishing initial pricing on the basis of potential competition was premised on the assumption that competition would flourish in the near term. As demonstrated by KMC and others in initial comments, this assumption has proved erroneous.[13] Accordingly, the Commission should abandon the proposal to establish pricing flexibility on the basis of potential competition.

Instead, the Commission should not permit, or further consider, establishing any pricing flexibility until there is a substantial degree of competition in the local service market. This approach is most likely to assure that the goals of the 1996 Act are achieved. KMC urges the Commission, in grappling with the difficult competitive issues raised in this proceeding, to err on the side of caution. Delaying further consideration of pricing flexibility until it is clear that local competition is flourishing will not harm incumbent LECs. KMC suggests that the very high, and in some cases shocking, rates of return that incumbent LECs are earning under price cap regulation eliminate any need to rush to establish pricing flexibility both as a legal and policy matter.[14]

III. The USTA Proposal Does Not Provide Any Basis for Establishing Pricing Flexibility

The pricing flexibility proposal of the United States Telephone Association ("USTA") appears to be similar to the pricing flexibility proposals of Ameritech and Bell Atlantic. Accordingly, it suffers from the same defects cited by KMC in its earlier comments.[15]

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[13] KMC Comments at 2.

[14] The mean rate-of-return for price cap companies for interstate services was 15.64% in 1997. The highest rate-of-return was 48.86%. Interstate Rate or Return Summary Years 1991 through 1997, Industry Analysis Division, Common Carrier Bureau.

[15] KMC Comments at 3-8.

Under these proposals, substantial pricing flexibility would be granted in "Phase 1" if the incumbent LEC has achieved a state-approved interconnection agreement or statement of generally available terms ("SGAT") regardless of whether there is any genuine level of competition. Thus, for Phase 1 switched access pricing flexibility, the USTA proposal would require only that "customers are utilizing alternative switched access services."[16] Read literally, this could permit flexibility even if only one customer is using a UNE. In addition, the fact that an interconnection agreement has been approved by a state does not mean that any actual competition is occurring. Thus, the interconnection agreement may have been entered into but the competitive entrant may not be actually providing service because it is still overcoming the other challenges involved with providing competitive service, some of which are under the control of the incumbent LEC. The CLEC may be still in the process of raising capital, obtaining state certification (where the incumbent has been willing to negotiate an interconnection agreement prior to the CLEC obtaining state certification), obtaining local authority to use rights of way, obtaining pole attachment rights from the incumbent LEC or others, or obtaining collocation rights from the incumbent. In reality, satisfying all of these requirements can take years. Thus, USTA's proposal would grant incumbent LECs a substantial head start on pricing flexibility well in advance of actual competition occurring.

Moreover, even if a CLEC is actually providing service, the proposed pricing flexibility that would be permitted would not be tailored in any meaningful way to the competition that is actually occurring. Thus, USTA would apparently grant pricing flexibility throughout an MSA, or LATA if its proposed preconditions are met anywhere in the MSA or LATA. KMC submits

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[16] USTA at Attachment E.

that there could not be any rational basis for granting pricing flexibility in an extremely wide area when competition is occurring with respect to services offered in only one or a few central offices. And, the pricing flexibility permitted would be very substantial, allowing nearly complete deregulation of new services, price deaveraging, volume and term pricing, contract pricing, and promotional pricing throughout a LATA or MSA.

Morever, even assuming that pricing flexibility should be established on the basis of potential competition instead of actual substantial competition, the USTA proposal cannot be taken seriously as demonstrating that carriers have removed barriers to entry. USTA makes no reference to compliance with key market opening provisions of the Act. Thus, it does not propose that incumbent LECs demonstrate compliance with any appropriate marketing opening requirements. Interconnection agreements and SGATs can be considerably narrower than any reasonable set of standards that would provide confidence that an incumbent LEC has removed barriers to entry. It was no accident that where Congress wanted a more realistic test of removal to barriers to competition it established a competitive checklist in Section 271. KMC submits that the existence of SGATs and interconnection agreements falls far short of a demonstration of removal of barriers to entry.

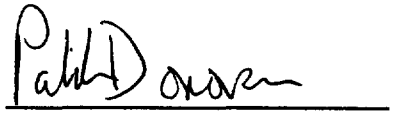
In essence, the USTA proposal and those of Ameritech and Bell Atlantic seek to obtain pricing flexibility without meeting any reasonable standard of either potential or actual competition. Instead, they urge the Commission to establish substantial pricing flexibility on the basis of partial steps towards removing barriers to entry and minimal actual competition. KMC submits that establishing pricing flexibility on the basis of a mixture of half-baked potential and actual competition requirements would be far worse than basing pricing flexibility merely on a

thorough-going standard of removal of barriers to entry. Instead, as discussed, the Commission should not permit pricing flexibility until incumbent LECs have fully removed all barriers to entry everywhere and competition is flourishing.

IV. CONCLUSION

For these reasons, KMC requests that the Commission not adopt pricing flexibility at this time. Instead, the Commission should take steps to establish a more complete implementation and enforcement of the key market opening provisions of the 1996 Act.

Respectfully submitted,



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